

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JAMES D. JOHNSON, AS NEXT
FRIEND TO OLIVIA Y, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:04CV251-TSL-FKB

GOVERNOR PHIL BRYANT, ET AL.

DEFENDANTS

MOTION HEARING

BEFORE THE HONORABLE F. KEITH BALL
UNITED STATES DISTRICT JUDGE
AUGUST 24TH, 2018
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFFS: MS. MARCIA R. LOWRY
MR. MICHAEL J. BENTLEY

FOR THE DEFENDANTS: MR. JAMES L. JONES
MS. KENYA KEY RACHAL

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR

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1 THE COURT: You can be seated. All right.

2 Clay, we do have someone on the phone?

3 IT TECHNICIAN: Correct?

4 THE COURT: The court calls the case of *Olivia Y, et*
5 *al. v. Phil Bryant, et al.* This is civil action number
6 3:04cv251. I will first have counsel identify themselves for
7 the record as well as the parties on whose behalf you're
8 appearing, starting with plaintiffs' counsel.

9 MS. LOWRY: Marcia Lowry for -- counsel for
10 plaintiffs, Your Honor.

11 THE COURT: All right.

12 MR. BENTLEY: And Michael Bentley, also counsel for
13 plaintiffs.

14 THE COURT: Okay. Defense counsel?

15 MR. JONES: Your Honor, I'm James L. "Larry" Jones,
16 counsel for the defendant.

17 THE COURT: All right.

18 MS. RACHAL: And I'm Kenya Key Rachal, counsel for
19 defendants.

20 THE COURT: All right. Mr. Dickinson, you're also
21 here with us. So if you'll go ahead and just identify yourself
22 for the record.

23 MR. DICKINSON: Thank you, Your Honor. Jess
24 Dickinson, commissioner for the department.

25 THE COURT: Thank you. Appreciate you being here in

1 person. Thank you.

2 It's my understanding we also have someone on the
3 phone with us. If you will identify yourself for the record,
4 please.

5 MS. TAYLOR: Yes. This is Lisa Alexander Taylor from
6 Public Catalyst, and I'm one of the monitors.

7 THE COURT: All right. I appreciate you appearing as
8 well. And do you -- can you hear me fine? You came -- you
9 came through loud and clear, but can you hear me okay?

10 MS. TAYLOR: Yes, I can. Thank you.

11 THE COURT: All right. Thank you.

12 This matter is before the court on the plaintiffs'
13 motion for scheduling conference and for amended case
14 management order permitting limited discovery and response to
15 defendants' objections to plaintiffs' proposed discovery. That
16 motion is document 768 on the docket of this court.

17 It is essentially in conjunction with or in response
18 to the defendants' motion for relief under Section 11.2(a) of
19 the Second Modified Settlement Agreement and Reform Plan and
20 Rule 60(b) of the Federal Rules of Civil Procedure. Long
21 titles, but that's what they are. And that's document 756 on
22 the docket of this court.

23 Let me go ahead and just kind of give a summary of
24 where we are, and then I'll give both sides an opportunity to
25 address some of the issues. I think I can short-circuit some

1 of it, but let me at least couch why we're here for purposes of
2 the record.

3 The defendants had filed a motion that I've already
4 referenced that is essentially requesting relief from the
5 Second Modified Settlement Agreement and Reform Plan
6 specifically dealing with a request for relief from the
7 90 percent caseworker caseload requirement in that second MSA.
8 And they also request an evidentiary hearing before the
9 district judge in this case, Tom Lee.

10 Essentially, the defendants are asserting in the
11 motion that they have made all reasonable efforts to comply
12 with the 90 percent caseload metric, also that they have
13 fulfilled their obligations to seek sufficient funding from the
14 Mississippi Legislature. And they're also requesting equitable
15 relief, specifically a directive from the district judge to
16 develop a plan to achieve a reasonable level of caseload
17 compliance, as it's phrased in the motion.

18 The plaintiffs, although they have already responded
19 to that motion, are requesting an opportunity to conduct some
20 discovery relevant to some of those issues and requesting an
21 opportunity to make -- to file a supplemental response to the
22 motion. And, as I understand it, plaintiffs' counsel have
23 already propounded some discovery. Is that right?

24 MS. LOWRY: That's correct, Your Honor.

25 THE COURT: All right. Defendants have objected to

1 that discovery and essentially are taking the position that no
2 discovery should be permitted prior to a ruling by the court on
3 the motion that they have filed seeking relief from the MSA.

4 Is that -- am I accurately stating defendants'
5 position? In a nutshell, y'all are objecting to any discovery
6 before the evidentiary hearing or a ruling from the court.

7 MR. JONES: Your Honor, that -- we stated that
8 position, but we immediately also set forth that if -- that's
9 discretionary. We assumed the court would consider discovery
10 and we do recommend certain limits with regard to that
11 discovery.

12 THE COURT: Okay.

13 MR. JONES: So we were not hard and fast on no
14 discovery; but for reasons I'll address in our presentation to
15 the court, we think the discovery should be very limited. It's
16 a very narrow issue in the 60(b) motion related to the
17 inability to comply with this metric as a result of over a
18 \$50 million deficit in fiscal year 2018 and \$23 million less in
19 requested funding for fiscal year 2019. Those are essentially
20 facts that are discovered from documents.

21 THE COURT: Okay. All right. Well, I'm going to take
22 all the suspense out of the motion and go ahead and say I've
23 been in contact with Judge Lee's office. So this isn't really
24 coming just from me, but Judge Lee wants there to be discovery.
25 So the purpose of our conference today and the purpose of this

1 hearing is, I'll go ahead and say, the plaintiffs' motion is
2 going to be granted as far as a modification -- whether you
3 want to call it a modification of the case management order or
4 whether it is just a scheduling order that we need to put into
5 place as to the amount of time that we're going to allow for
6 discovery, the scope of that discovery, and then, obviously,
7 coming up with a briefing schedule after the discovery.

8 Judge Lee has -- I believe Judge Lee has every
9 intention of having an evidentiary hearing after everything is
10 briefed up. And Judge Lee wants to have all of the relevant
11 information before him that is essential and necessary for him
12 to make an -- to make an informed decision.

13 So with that being said, I really don't want to hear
14 argument from counsel. The main reason I wanted everyone to be
15 here is we need to just -- we need to address those issues, how
16 long would this -- and maybe the first topic is what's the
17 scope of the discovery going to be; two, once we can -- and I
18 would love for us to be able to reach an agreement on that and
19 that y'all don't force me to have to rule on it. So I first
20 want to just talk about whether we can reach an agreement on
21 what the scope of discovery would be. If we can't, then I'll
22 make a decision and I'll go ahead and make a decision today.

23 Two, we need to come up with the time period that
24 would be necessary to complete that discovery; and, obviously,
25 the scope will impact that. So we'll deal with the scope

1 first, then the timing, and then we'll talk about a briefing
2 schedule.

3 Let me -- Mr. Jones has already made a little bit of
4 argument with respect to what they believe the scope of
5 discovery ought to be. So let me turn it over to plaintiffs'
6 counsel and we'll give you an opportunity to make whatever
7 argument you wish to make or just to share with the court what
8 you believe would be the necessary scope of discovery.

9 MS. LOWRY: Thank you, Your Honor.

10 THE COURT: Yes.

11 MS. LOWRY: Your Honor, this issue does not arise out
12 of events of the last two years. This case has been in a
13 monitoring perspective for eight years. Defendants have never
14 complied with the obligations that are set out in a settlement
15 agreement to which they have agreed.

16 The situation, frankly, is very dire. Children have
17 died. Children continue to be neglected in foster homes
18 because there are not enough workers to visit the foster homes.
19 When we filed this most recent -- and this is the second
20 contempt motion. When we filed this contempt motion --

21 THE COURT: Could you pause for just a second.

22 (PAUSE)

23 THE COURT: All right. You may proceed. Go ahead.

24 MS. LOWRY: Okay. Thank you, Your Honor. So this is
25 the second contempt motion that has been filed in this case.

1 And each time -- when we had the first -- and we have gone to
2 very, very great lengths to avoid the filing of contempt
3 motions. Because the state has never been in compliance with
4 this settlement agreement, there have been always multiple
5 grounds on which to seek a contempt motion; but we have tried
6 to work with the state over these eight years to try to resolve
7 the situation. And there have been many, many efforts.

8 And I think it's important for the court to know that
9 this is not something that has only recently arisen and that
10 when we seek a motion for contempt, as we have earlier this
11 year, that is because we really are at our wits' end with
12 regard to trying to get compliance with the agreement.

13 The monitoring has changed in this case. A monitor
14 who was a very, very conscientious and rigorous monitor issued
15 numerous reports, all of which showed the defendants were out
16 of compliance with this agreement and documented all of the
17 issues on which they were deficient.

18 More than two years ago we entered into a different
19 process; and we brought in an organization that the defendants
20 were very, very happy with to provide the technical assistance
21 to the agency, because agencies do not automatically come into
22 compliance with agreements. It's work.

23 THE COURT: Hang -- I hate to interrupt you.

24 MS. LOWRY: That's okay.

25 THE COURT: But when I used the phrase before "I want

1 to kind of cut to the chase" --

2 MS. LOWRY: Okay.

3 THE COURT: -- I really -- it's really not that
4 beneficial to me to hear all of the background information.
5 Some of it I'm already aware of; but, more importantly, I'm a
6 little bit limited on time today.

7 MS. LOWRY: Okay.

8 THE COURT: What I would like to do is let's go ahead
9 and get directly to the issue of what discovery -- given the
10 motion that the defendants have filed seeking relief from the
11 agreement, what issues do you believe you need to conduct
12 discovery on in order to more fully respond to the defendants'
13 motion and to be prepared for the evidentiary hearing that
14 Judge Lee is going to hold?

15 MS. LOWRY: Thank you, Your Honor. I will do that.

16 THE COURT: All right.

17 MS. LOWRY: What we think is relevant here is to
18 understand whether these are unforeseen circumstances and
19 whether this could have reasonably been expected or not with
20 regard to the funding issue that was before the legislature.
21 Defendants have portrayed this as an extraordinary event and a
22 fiscal crisis. I do want to put quotes around that.

23 We don't think it's a fiscal crisis. We think this is
24 a crisis that -- it is a crisis, but that has continued for
25 eight years. I don't think that's a crisis. I don't think

1 that meets the parameters of what 60(b)(5) allows. And what's
2 more, there's an explicit provision that prohibits defendants
3 from seeking relief from the judgment until 2020.

4 So what we want is discovery on what the funding has
5 been over the last five years, what efforts have been made and
6 where else the money could come from and exactly what the scope
7 of the shortfall is. In fact, although the defendants say
8 they've put in a lot of information, frankly, we tried to
9 figure out what the information showed and we can't. And we --

10 THE COURT: Do you believe that the written discovery
11 that you've already propounded captures all of the issues that
12 you believe discovery is necessary on?

13 MS. LOWRY: We think the discovery is in two phases,
14 one, the written discovery we have propounded. And, yes, Your
15 Honor, we do believe that it covers all the issues. Secondly,
16 we want to take depositions. And we have asked in the
17 discovery for who are the people who have knowledge of these
18 issues.

19 So the discovery is all related, but -- and we think
20 the discovery is sufficient except we want to take depositions
21 of the people who are identified. Basically, that's it.

22 THE COURT: Okay. All right. Let me hear from
23 Mr. Jones, and what objection would you have or -- let me
24 hear -- if this court was just to say, *Okay. I'm going to*
25 *allow them to propound this discovery and to take depositions*

1 as to those that may have personal knowledge of those discovery
2 responses and the issues that are addressed in that discovery,
3 what objection would you have to that, Mr. Jones?

4 MR. JONES: Can I come to the podium?

5 THE COURT: Yes, sir.

6 MR. JONES: Thank you, Your Honor. First of all --
7 and I'll do this very briefly -- the discovery is related to
8 the 60(b) motion that's before the court. The 60(b) motion
9 seeks two things. One is relief from a 90 percent caseload
10 compliance requirement that is in two agreements, both of which
11 were entered by this court as consent orders.

12 And it's interestingly -- interesting and very
13 critically legally important, those orders were entered in
14 institutional reform litigation which sets up a very specific
15 standard of review for the court in reviewing a request for
16 modification. But the modification request is only relief from
17 one requirement, that is, a 90 percent caseworker caseload
18 requirement, and an additional request that the court direct
19 the defendants, including the primary client, the department of
20 protection services, to work with the court monitor to develop
21 a plan to achieve compliance in the future.

22 Now, based on the failure to meet that requirement,
23 the plaintiffs have essentially requested that this court find
24 this department in contempt and then place the department in a
25 receivership of undefined scope for an undefined period at

1 extraordinary unbudgeted costs. So this 60(b) motion is
2 critically important, but it is very limited.

3 And the discovery should be limited not, as
4 plaintiffs' counsel with whom I respectfully disagree on many
5 points, but I'm not going to belabor those today -- it has to
6 be limited to the scope of the motion itself that's before the
7 court for 60(b) relief of a consent order entered in this
8 institutional reform litigation.

9 And that motion sets forth that the reason the
10 department was unable to achieve this metric was because of two
11 things. And keep in mind that in -- if you'd note this date, I
12 think it's very important for all of us to consider.
13 Commissioner Dickinson, former Justice Dickinson, one of the
14 leading jurists and citizens in our state, became the
15 commissioner of this department on September 18th of 1977
16 (sic). The 90 percent metric deadline did not become a firm
17 requirement until December 1 of 2017.

18 Now, what Justice Dickinson immediately experienced in
19 one of the most complex departments in this state to run and
20 manage was there was a looming financial deficit that was going
21 to mean -- and I may be off a month or two, but in early 2018
22 with the fiscal year ending June 30 of 2018, the department was
23 experiencing what was projected initially as over a \$50 million
24 deficit. In other words, the department was not going to be
25 able to pay its bills and was going to run out of money in

1 March or April of 2018. That fiscal crisis was resolved. That
2 is the first basis for the changed circumstances in the 60(b)
3 motion.

4 The second basis is equally specific. That basis is
5 in that same general time period the department was applying to
6 the state legislature for appropriations necessary to fund its
7 operations including the requirements under the consent orders
8 that had been entered. It was necessary under
9 Judge Dickinson's leadership to amend the request for
10 appropriation and to seek approximately \$133 million which the
11 legislature was told would be necessary to meet operations even
12 after budget cuts and other fiscal steps were taken to address
13 the deficit. Instead of \$133 million, the legislature after
14 balancing all of the demands that the legislature faces in the
15 fiscal arena awarded \$23 million less.

16 THE COURT: All right. I hate to do it, but I have to
17 do the same thing that I did to plaintiffs' counsel.

18 MR. JONES: I'm sorry if I got carried away.

19 THE COURT: I understand -- well, and I understand
20 that lawyers always kind of want to get to the main part of
21 their case and make the point. I have to deal with some issues
22 that are often very boring and tedious. And the one that I've
23 got to deal with today is am I going to -- Judge Lee has
24 already indicated he wants some discovery conducted because he
25 wants to be fully informed. So I'm going to allow it. So my

1 job is to figure out the best way to proceed on that. And --

2 MR. JONES: Let me ask you a question.

3 THE COURT: -- I'll go ahead and tell you. I'm
4 inclined to just grant the plaintiffs' motion, allow them to
5 propound the written discovery that they -- to enter an order
6 that they are allowed to propound the written discovery that's
7 previously been propounded and to take the depositions that --
8 of those that have personal knowledge of the responses.

9 So my main purpose at this point in the hearing in
10 turning to you is do you have -- is to gather from you whether
11 you have particular objections to these interrogatories and
12 requests for production or that you believe that they are too
13 broad. And if so, tell me specifically what you believe is too
14 broad and why.

15 MR. JONES: All right. First of all, they're too
16 broad in the temporal time period. They range -- and I could
17 go through them one by one, but they range from July -- I'm
18 sorry -- for fiscal year 2016 to the present. Fiscal year 2016
19 began on June 30 of 2015.

20 So, consequently, fiscal year 2016 is irrelevant.
21 Justice Dickinson was not there. This financial crisis was not
22 present. The 90 percent metric was not even in place as a
23 requirement until December 31st of 2017. So fiscal year 2016
24 is irrelevant. Fiscal year 2017 is also irrelevant. That
25 fiscal year ended on July -- on June 30 of 2017.

1 What is in play here is fiscal year 2018 and fiscal
2 year 2019. That is the period which the budget crisis arose
3 and that is what we're basing our 60(b) motion on. So,
4 consequently, the first limitation needs to be, in my humble
5 opinion, for restriction of the temporal period to fiscal years
6 2018 and 2019.

7 Now, the other limitation that I would urge the court
8 would be when you review the -- there's a first set of -- first
9 request for production, second request for production, and
10 first set of interrogatories. There -- parts of those requests
11 are unduly burdensome and overbroad because they seek, in
12 essence -- I could refer you to point by point, but I think I'd
13 like to do it generally. They seek in essence witnesses,
14 disclosures, documents about not only available funds but
15 potentially available funds and -- and the specific use of
16 available funds.

17 Well, in the Department of Child Protection Services,
18 funding is a moving target. Funds are allocated to the
19 department pursuant to a budget. That budget is constantly --
20 the operational budget is constantly moving as there are needs,
21 as there are crises, as there are additional demands, as
22 additional programs come off and online, as contracts end. So
23 the discovery should be limited to the questions in the 60(b)
24 motion. Was there a financial crisis in fiscal year 2018 and
25 what efforts were made to secure funding in fiscal year 2019?

1 That is largely a documentary production. With those
2 two limits and some restriction as to telling us exactly how
3 funds were used when that's not the question, I think that the
4 discovery that's been tendered could be workable. There are
5 some questions which relate to the --

6 THE COURT: Let me stop you right there. You said
7 some of them -- the way I'm interpreting the last point that
8 you were making --

9 MR. JONES: Right.

10 THE COURT: -- is that the wording of some of those
11 interrogatories and requests for production would be -- would
12 be so broad that they would be unduly burdensome and the -- you
13 know. You've practiced law for a long time. You've had to
14 craft discovery responses; and often you end up propounding
15 discovery responses that may be too broad, but the responding
16 party can in good faith provide certain information subject to
17 that objection that it is -- the wording of it is overly broad
18 and it's unduly burdensome.

19 And then the responding party will usually provide
20 information that is responsive to that discovery request that
21 isn't too -- that is clearly what -- the main part of what the
22 requesting party is seeking. Could you --

23 MR. JONES: I don't want --

24 THE COURT: I don't want to get down into details of
25 trying to word discovery responses today. If I were to allow

1 the plaintiff to propound the discovery that has been
2 previously propounded, you would -- the responding party, the
3 defendants in this case -- I mean the defendants in this case
4 would have available to them those types of objections. And
5 so -- and I know I may find myself in another discovery hearing
6 as a result, but I don't know any better way to do it.

7 I'm hoping that maybe the parties could work together
8 and possibly reach agreements as to whether the information
9 that is provided in the documents, that are provided are
10 sufficiently responsive that you don't have to bring a
11 discovery dispute to me. But I do want to make it clear that
12 in the event that I issue an order that the plaintiff is
13 allowed to propound the previously propounded discovery and
14 depose those that maybe have personal knowledge of those
15 responses, that it will still be available to the parties to
16 make those types of objections.

17 MR. JONES: Your Honor, and that is why I did not go
18 document -- I mean request by request.

19 THE COURT: Yes.

20 MR. JONES: We're perfectly fine with that. We will
21 respond in good faith. I have the greatest respect for
22 Ms. Lowry and the work she does. We all tender discovery
23 requests that sometimes have language that's been around a long
24 time --

25 THE COURT: Whether it's in the request or in the

1 response. I agree.

2 MR. JONES: But I think the issues are fairly narrow
3 in the 60(b) motion. We will push out documents. But I think
4 the court understands in an agency of the nature of what we
5 have, the discovery needs to be limited so that we -- it does
6 not disrupt the necessary management functions and operations
7 of this agency.

8 THE COURT: Okay.

9 MR. JONES: And that would be my suggestion. We can
10 in good faith respond and, hopefully, work out any
11 difficulties. We will produce documents that show why we
12 believe there was a crisis. There's really no dispute about
13 that. There was a \$12 million state appropriation and over
14 40 -- over \$30 million that ultimately was transferred to the
15 department from DHS. And the allocat- -- the appropriation in
16 2019 is a matter of public record.

17 THE COURT: All right. Ms. Lowry, let me hear from
18 you on the possibility of limiting the time period to the
19 fiscal years 2018 and '19.

20 MS. LOWRY: Your Honor, we don't accept a basic
21 premise here that the defendants are operating under. We have
22 a settlement agreement that requires the states to do specific
23 things, and it is not dependent on appropriations. So whether
24 the legislature appropriated the money or not -- and we do
25 think there's a big question about how the budget got worked

1 out -- we think it's also important to know how the money has
2 been appropriated previously, because the governor's a
3 defendant here and the state has been obligated and in the
4 settlement agreement it says the state is obligated to produce
5 the results in the settlement agreement. And the legislature
6 doesn't appropriate specific positions, and there are more
7 things going on with regard to the defendants' noncompliance
8 than just this issue.

9 So we don't think it should be limited to 2018,
10 because if the legislature has ever appropriated money
11 specifically to comply with this agreement, it is sort of news
12 to us. And we don't think that the state can be limited to
13 what the legislature specifically appropriates for specific
14 things.

15 THE COURT: All right. And you're asking for fiscal
16 years -- your discovery would be for fiscal years what?

17 MS. LOWRY: Your Honor, it's for the past five fiscal
18 years.

19 THE COURT: All right. What I was going to ask you is
20 you do agree -- or correct me if I'm wrong -- that the only
21 provision that they are seeking relief from is the 90 percent
22 caseload requirement. Correct?

23 MS. LOWRY: Yes, Your Honor.

24 THE COURT: And I thought Mr. Jones did a good job of
25 succinctly saying that's the only issue in the motion.

1 MS. LOWRY: That's right.

2 THE COURT: So why should you go back -- and he
3 represented to the court and I wanted to ask you that that was
4 a provision that was not added until 2017. Is that true?

5 MS. LOWRY: No.

6 THE COURT: -- or false?

7 MS. LOWRY: That's not true, Your Honor. There have
8 always been caseload limits in the agreements, and there have
9 always been obligations to comply with caseload limits.

10 THE COURT: All right. Did the percentage change?
11 What change would he be referring to in 2017?

12 MS. LOWRY: I think what -- what happened in 2017 was
13 that the state for the first time in the history of this case
14 became serious about trying to comply with the agreement and
15 brought in a monitoring group that also was very specific. And
16 the monitoring group said, *Before you do anything else, you*
17 *have to get your caseloads under control.*

18 And the caseloads have never been under control. And,
19 frankly, Your Honor, I don't as I stand here today remember
20 what percentages were previously in the agreement, but this was
21 an -- this was a number that was arrived at by the monitoring
22 group after they did research on what the caseloads actually
23 were. And that kind of research had never been done before
24 because it was almost unfathomable to try to figure out what
25 they were.

1 THE COURT: Okay.

2 MS. LOWRY: So this was a real effort to look at it.

3 THE COURT: My concern is that if they're -- if
4 they're doing -- I don't know how much time would be required
5 for them to provide the information you're requesting for one
6 fiscal year. I don't know if that is a major endeavor for them
7 to do that. If it is, you know, I don't know -- but if it is,
8 then it would be, obviously, exponentially more the more years
9 I add and the more years I allow. I don't know.

10 Could you give me a little bit more idea of exactly
11 what it is that you're requesting that just using common sense
12 you can envision that it is going to take them some time to
13 get? Can you give me some more details on exactly what I'm
14 talking about --

15 MS. LOWRY: Certainly.

16 THE COURT: -- I'm dealing with?

17 MS. LOWRY: You know, one thing that the state has
18 said that is absolutely right is that the budget is constantly
19 moving. And that is what, in fact, happened. So there is no
20 really fixed budget. There's a lot of interaction among the
21 agencies. And it is our position that more money has gone into
22 the agency in previous years than has been proposed to go into
23 it over this next year. And that's why it is important to try
24 to track this back.

25 Your Honor, I think insofar as records exist, they are

1 very limited in scope, and this will not be a burdensome effort
2 to produce them. Your Honor, we -- we want to get this issue
3 to the court, and we want the court to have the information the
4 court needs. We have no interest at all in the defendants
5 spending months and months producing discovery. We want this
6 as efficiently and as quickly as possible. If it doesn't
7 exist, it doesn't exist; and they can tell us that. That's
8 fine. But we do think it's necessary to have the five-year
9 history here.

10 THE COURT: What if I gave you three?

11 MS. LOWRY: We'll take three, Your Honor.

12 THE COURT: Okay.

13 MR. JONES: Can I say something from here?

14 THE COURT: Absolutely. And if both of you -- now
15 that we're kind of going back and forth and we may go a little
16 bit more back and forth, if y'all want to be at counsel table,
17 that's fine with me.

18 MR. JONES: I can say it from here because I know the
19 court is busy and wants to move on.

20 You don't need to move.

21 The first point, I want to make this very clear. The
22 United States Supreme Court as early as in the *Rufo* case, which
23 was in the '90s as I recall and I believe it's in -- on page
24 392 of this case, has said that in a 60(b) motion to change a
25 consent order in an institutional reform case, financial

1 constraints are relevant.

2 It was stated that that is not the case. That is
3 absolutely incorrect. And that is the basis legally for the
4 60(b) motion before the court.

5 But in terms of the scope of discovery, we're dealing
6 with the two grounds in the 60(b) motion that we're only asking
7 the court for relief for, and that is the 2018 financial crisis
8 and the 2019 appropriation. We're not putting on other
9 defenses. And it is very burdensome -- if the court would
10 like, I have the discovery here to say -- to look at these
11 discovery requests as anything other than extremely demanding
12 to the department.

13 It's for an entire fiscal year: Give information,
14 documents and witnesses who can testify about all available
15 resources, all potential resources, all uses of the moneys you
16 received. That's how the discovery is phrased. And that is
17 extremely burdensome going back five years with many people who
18 were involved in this agency no longer being in place.

19 And we are dealing with the crises faced by
20 Justice Dickinson after he arrived on September 18 of 2017. So
21 fiscal years '18 and '19 in my opinion are critically important
22 as limitations. If the court is going to push us to '17, I
23 think it's going to put a lot of demands on us. But to go back
24 to fiscal year '16 or even before -- one of the questions asked
25 for documents about any deficit ever suffered by the

1 department. I don't know what the time limitation on that is,
2 but that's the request. So we would urge you to bring this to
3 a head in a way that the court can make a decision on what the
4 60(b) motion states.

5 THE COURT: I hear you. At the same time I think that
6 there may be some -- there's already been some argument made
7 that, as I'm understanding it, but may -- some of these issues
8 may deal with -- since this has been in place for a long time,
9 whether you had -- some of what the department may have done in
10 the past maybe had created the case that existed later and that
11 some of the things -- and I hear you with respect to when
12 Justice Dickinson started, but the issue is not just what has
13 happened since he's been in charge but what has happened prior
14 to him being in charge. And that -- some of that may be
15 relevant.

16 Now, what I am concerned about is creating -- putting
17 a burden on the department that is unreasonable under the
18 circumstances. And I would like to limit it in such a way that
19 it will -- I'm weighing and trying to balance between not
20 putting an unreasonable burden on them and providing plaintiffs
21 with the information they need. And I'm trying to strike a
22 balance there. Yes, sir. Go ahead.

23 MR. JONES: As a young boy, they would sometimes let
24 me ask a question if I raised my hand. Can I show you one
25 thing, Your Honor?

1 THE COURT: Absolutely.

2 MR. JONES: Your Honor, the requirement we are seeking
3 relief from was not in place as a requirement until December 31
4 of 2017.

5 MS. LOWRY: No, Your Honor, we agree with that. We
6 agree with that. There have been previous caseload
7 limitations.

8 THE COURT: Yes. Okay.

9 MR. JONES: This is simply a page from the STRO.

10 (DOCUMENT TENDERED TO THE COURT)

11 MR. JONES: And so, consequently, the -- that is the
12 only deadline metric we are seeking relief from. And I will
13 say this on the record and represent this absolutely to you.
14 This case started in 2004, 14 years ago. If it goes another 14
15 years, I probably will not be standing here. But there has
16 never been compliance with a 90 percent standard in the history
17 of this agency.

18 This is a brand-new metric. No one, not the former
19 commissioner, not the commissioners in the past, not the range
20 of governors, has ever met this standard. And there are
21 reasons we want to present why we didn't meet it the first time
22 it was required. It is just simply not true that there were
23 other deadlines of 90 percent at any time in the past. Perhaps
24 it would have been relevant if there were. There were not.
25 That is the deadline.

1 THE COURT: Okay. Ms. Lowry, any response to that?

2 MS. LOWRY: Your Honor, there -- this is the third
3 settlement agreement in this case. Each one has had some
4 variation. Each one has had caseload limits. The 90 percent
5 metric was the one that was entered most recently. There have
6 been previous requirements. The State has -- and he is
7 correct; the State has never complied with any of them. So we
8 stand on that.

9 But we do need some previous years. And if the court
10 wants to limit us to three years, we can live with that. But
11 the state has never complied with anything in this case. And
12 last year they had a year off from any monitoring to give them
13 the time to build capacity. They promised us they would get to
14 this particular metric in '18. They have not.

15 And this is only the beginning. And I don't want to
16 go into the details, Your Honor. I know the time is limited
17 here. But we do need some earlier year budget information.
18 And if the court wants to give us three years, we will accept
19 that.

20 THE COURT: All right. I'm a big fan and have tried
21 to consistently rule definitely on things and move it off my
22 desk and able to move on to something else. Sometimes I find
23 myself in a situation where maybe I should do it in phases, and
24 I'm going to do it here.

25 What I'm going to do is grant the plaintiffs' motion

1 and specifically order that the plaintiffs may propound the
2 discovery set out in Exhibit A to their motion and conduct
3 depositions of witnesses identified in said discovery. That's
4 the way it's worded in your motion. Maybe I'm creating a
5 problem where one doesn't exist, but there may be -- I'm going
6 to grant the way it's worded in your motion.

7 I also realize there may be someone that's not
8 specifically identified in that discovery that you may based on
9 discovery responses or other information believe they need to
10 be deposed, and I'm not shutting the door on that. But I'm
11 going to grant -- my order is going to be worded the way that
12 your motion is. And if you wish to take any depositions of
13 anyone that's not identified in discovery, then you'll need to
14 file a motion. So -- but that's going to be the order of the
15 court, that the plaintiffs may propound the discovery set out
16 in Exhibit A and conduct depositions of witnesses identified in
17 that -- in said discovery.

18 I am going to limit it initially in my order to fiscal
19 years 2018 and '19. If after getting that information you wish
20 to request additional years, bring that to me. And the reason
21 I didn't say file a motion is in my typical case management
22 order when there are discovery disputes, I first have a
23 telephone conference with the parties to see if we can work it
24 out.

25 So if you wish to go -- if you wish to go back further

1 than those two fiscal years, call my chambers. Let's all get
2 on the phone and let's see if we can work it out and reach some
3 kind of compromise. It may be some subset of the information
4 that you've previously gotten that you could get for those
5 other fiscal years. And I can think of other ways that we may
6 be able to resolve it.

7 But just to avoid the risk of placing an unreasonable
8 burden on the department, I am going to limit it -- my order is
9 going to limit it to fiscal years 2018 and '19, but I'm not
10 completely closing the door on you getting other information
11 about previous fiscal years.

12 I will also -- after you go through this process, both
13 parties will have a better feel for how time-consuming and how
14 burdensome it was to get -- to produce the information that you
15 requested.

16 I want to hear from both of you on -- I need to set a
17 deadline for the completion of discovery. How long do you
18 think it would take, Ms. Lowry?

19 MS. LOWRY: Your Honor, the defendants have --

20 THE COURT: And maybe I should be asking that of
21 defense counsel to start with, but --

22 MS. LOWRY: All right. Your Honor, defendants have
23 had these interrogatories since June 27th.

24 THE COURT: Yes, but if they operated like most
25 lawyers operate in the practice of law -- I hear that argument

1 all the time; but until the court orders you to do it, you
2 don't start doing what needs to be done. So it's -- let me go
3 ahead and turn to defense counsel because I think -- how long
4 do you think it would take to respond?

5 MR. JONES: I'd suggest 45 days, Your Honor, because
6 that will get the objections to the production. And, frankly,
7 there are no deponents identified in discovery. It just says
8 seeks to take deponents whose names come up from the
9 production.

10 THE COURT: Right.

11 MR. JONES: So I think 45 days would be -- would be
12 satisfactory. It's still going to be demanding.

13 THE COURT: Are you saying 45 days to --

14 MR. JONES: From today.

15 THE COURT: -- to produce the documents and provide
16 written responses, or are you saying to complete all the
17 discovery?

18 MR. JONES: Well, I was thinking in terms of a
19 discovery deadline. We would respond in 30 days under the
20 rules.

21 THE COURT: To the written discovery.

22 MR. JONES: Yes. Yes.

23 THE COURT: Okay.

24 MR. JONES: And we'll respond earlier if we can. We
25 want to move this along. And our responses may be staggered if

1 we can respond to certain things first while we're doing other
2 work. So I think 45 days to complete fact discovery.

3 THE COURT: Okay.

4 MR. JONES: Now, I would ask the court -- I assume
5 that your ruling would also authorize discovery by the
6 defendants within the same parameters.

7 THE COURT: Yes.

8 MS. LOWRY: Your Honor, does that mean also to
9 complete the depositions?

10 THE COURT: That's what he's saying and I think that's
11 unrealistic.

12 MR. JONES: I really wasn't thinking that. I was
13 thinking -- I'm sorry, Ms. Lowry. I was thinking to get all
14 the documents and interrogatory answers to you. So maybe 45
15 days to complete the written discovery.

16 THE COURT: Okay.

17 MR. JONES: Yes.

18 THE COURT: And if I misunderstood -- obviously, I did
19 misunderstand you. So I apologize.

20 MR. JONES: There would be no Thanksgiving or
21 Christmas if we do it in 45 days.

22 THE COURT: Okay.

23 MS. LOWRY: But, Your Honor, that does seem excessive
24 and we would ask --

25 THE COURT: You mean aggressive.

1 MS. LOWRY: I'm sorry, sir?

2 THE COURT: You said "excessive."

3 MS. LOWRY: Excessive. I said excessive, yes.

4 THE COURT: What's excessive?

5 MS. LOWRY: The 45 days to complete the written
6 responses --

7 THE COURT: Okay.

8 MS. LOWRY: -- because we would like to start taking
9 the depositions as soon as we can, and we would like to be able
10 to complete the whole discovery period as soon as we can. And
11 we are prepared to do the depositions as soon as people get
12 identified. And there are some that we can think will be
13 identified more quickly. I mean, obviously, Commissioner
14 Dickinson is somebody who's going to be deposed. But we do
15 need the written responses in order to depose them.

16 THE COURT: Yeah. I was thinking 45 days is awfully
17 aggressive to try to get it all done. And, Mr. Jones, you
18 did -- after I asked my question, you said, well, no, you were
19 thinking that you would get the responses done in the customary
20 30 days.

21 MR. JONES: And have all of the documents produced
22 within 45 days. That's really what I was --

23 THE COURT: Okay. I understand.

24 MR. JONES: I thought that's what you were asking.

25 THE COURT: I will allow that. Let's do that, that

1 you'd have written responses within 30 days, document
2 production would be completed within 45.

3 And then how long do you think you need to take
4 depositions, Ms. Lowry?

5 MS. LOWRY: We can do it in two weeks, Your Honor, all
6 the depositions.

7 THE COURT: Okay.

8 MR. JONES: Can we, Your Honor, come back -- we've
9 always been impressed with the ability of this court to guide
10 the parties in litigation. Could we come back at the 45-day
11 point and we will know how many depositions they're requesting?

12 This agency is undergoing multiple federal and state
13 reviews constantly; and the staff is limited, particularly at
14 the very top. And at the 45-day point or maybe at any -- some
15 point close to that, I'd suggest we confer with you and
16 determine how long do we need for depositions.

17 If they're going to take -- they've asked for, I don't
18 know -- well, they haven't asked for a number; but if it's five
19 depositions of senior people after the 45 days, that's not
20 going to be an easy thing to do during the
21 Christmas-Thanksgiving season and -- and with the schedule of
22 our executives. But it may -- if it's one person or two
23 people, maybe it's workable. So I'd suggest reserving that
24 time period.

25 THE COURT: I hate to say this, but I anticipate that

1 we're going to be on the phone at some point on some discovery
2 issues on this. What I'd prefer to do is set a deadline. And
3 there will be the language in this order that is the same
4 language that's in my case management order, that if you have
5 any disputes, then you can bring those to me, but you have to
6 do it before you can file a motion. And I have a feeling that
7 we'll have at least one telephone conference.

8 I would prefer to set a deadline for everyone to do
9 things. For example, if I set a date for us to get on the
10 phone, that's going to delay things even more. I would prefer
11 to go ahead and put the burden on plaintiffs' counsel and a
12 deadline that would require them to go ahead and send out their
13 notices of depositions. And then we'll know exactly what we're
14 dealing with when we get on the phone and they will have
15 identified by notice who it is that they want to depose and
16 then we can deal with it and it will be faster, because if we
17 can't get it worked out, then everybody knows what motions they
18 need to file. And after the conference we can get to the
19 motion filing stage instead of maybe having more than one
20 conference on that.

21 So the order of the court is going to be that all
22 discovery must be completed by -- and I'm going to count 60
23 days from today, whatever that is, and I'm going to give that
24 deadline. And we will identify that defendants must respond --
25 serve responses to this discovery 30 days from today and all

1 responsive documents that they intend to produce be produced 45
2 days from today.

3 MR. JONES: This is fact discovery, Your Honor?

4 THE COURT: I don't really -- I'm --

5 MR. JONES: As opposed to --

6 THE COURT: Why are you -- instead of expert
7 discovery?

8 MR. JONES: Yes, sir. I think the expert discovery --
9 expert opinions, if there are any, are going to be derived from
10 the --

11 THE COURT: Nobody's brought up the expert issue yet.
12 Are there going to be experts, and if so -- I mean, I know that
13 your discovery already requests information about experts.

14 MS. LOWRY: Yes, it does.

15 THE COURT: Okay. I didn't want to get into this. I
16 mean, now you have me -- you have my brain going down a totally
17 different course.

18 MR. JONES: It's not --

19 THE COURT: -- which is an expert designation
20 deadline. Let me finish. And then make sure you're speaking
21 into the mic and let's make sure we're only talking one at a
22 time.

23 I'm going to enter the order -- I'm only going to deal
24 with the issues that are pending before the court. And if
25 there need to be other issues that need to be addressed, you're

1 going to need to file a motion. I don't have any of those
2 issues in front of me right now. I have the plaintiffs'
3 motions for discovery. I'm granting it. I'm going to put in
4 the order what I have indicated, and that will be the order of
5 the court.

6 If we need to address some other issues, we'll address
7 them on another day; but I'm only going to decide what's
8 pending before me right now.

9 I will also -- I think that we need to -- I hate that
10 I say things like this sometimes, but I try to be a realist. I
11 have a feeling that some things may end up getting moved; but I
12 also want us to put in place a structure that if we need to
13 move things, we -- everybody knows what we're dealing with. So
14 my order is also going to include that the plaintiffs'
15 supplemental response to the defendants' motion must be filed
16 by, and it's going to be 30 days from the discovery deadline.
17 All right.

18 And then I'm also going to put in there that the
19 defendants' rebuttal in support of their motion must be filed
20 by, and it will be 30 days from the deadline for plaintiffs'
21 supplemental response. And if we have other discovery issues
22 or you face any additional discovery issues, call my chambers
23 and we'll deal with them. Okay.

24 Anything else from the plaintiff?

25 MR. JONES: No, Your Honor.

1 MS. LOWRY: Nothing, Your Honor.

2 THE COURT: All right. Anything further from the
3 defendants?

4 MR. JONES: No, Your Honor.

5 THE COURT: All right. That will be the order of the
6 court. Thank you.

7 (HEARING CONCLUDED)

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1 CERTIFICATE OF REPORTER
2

3 I, MARY VIRGINIA "Gina" MORRIS, Official Court
4 Reporter, United States District Court, Southern District of
5 Mississippi, do hereby certify that the above and foregoing
6 pages contain a full, true and correct transcript of the
7 proceedings had in the aforementioned case at the time and
8 place indicated, which proceedings were recorded by me to
9 the best of my skill and ability.

10 I certify that the transcript fees and format
11 comply with those prescribed by the Court and Judicial
12 Conference of the United States.

13 This the 27th day of August, 2018.

14
15 s/ Gina Morris
16 U.S. DISTRICT COURT REPORTER
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